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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF OREGON

11 GARY JENKINS, o/b/o N.J., a)
12 minor child,)
13 Plaintiff,) Civil No. 04-202-HU
14 vs.)
15 JO ANNE BARNHART,) FINDINGS AND RECOMMENDATION
16 Commissioner of Social Security,)
17 Defendant.)
18 _____)

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Nicholas Jenkins is a child seeking disability benefits. His
3 father, Gary Jenkins, brought this action pursuant to 42 U.S.C. §§
4 405(g), 1383(c)(3), to obtain judicial review of a final decision
5 of the Commissioner of the Social Security Administration
6 (Commissioner) denying Nicholas's application for Supplemental
7 Security Income (SSI) disability benefits. The parties agree that
8 the case should be reversed and remanded; the only issue for the
9 court is whether the remand should be for further administrative
10 proceedings or for a finding of disability and award of benefits.

11 **Procedural Background**

12 Mr. Jenkins filed an application on Nicholas's behalf on
13 September 4, 1992, seeking child's SSI disability benefits and
14 alleging mental impairments. The application was granted and
15 Nicholas received benefits until a redetermination pursuant to the
16 provisions of P.L. 104-193 found him not disabled as of September
17 25, 1997. The determination was upheld by a state agency disability
18 hearings officer on December 31, 1998. On March 31, 2000, after a
19 hearing, Administrative Law Judge (ALJ) Joseph Schloss issued a
20 decision upholding termination of Nicholas's benefits.

21 In June 2001, the Appeals Council vacated the decision and
22 remanded the claim, with instructions that the ALJ obtain
23 supplemental medical expert testimony to clarify the nature and
24 severity of Nicholas's impairments, and to reevaluate Nicholas's
25 subjective complaints and his parents' testimony.

26 A second hearing was held before a different ALJ, Jean
27 Kingrey, on July 18, 2002. However, as the Commissioner
28 acknowledges, ALJ Kingrey failed to obtain the supplemental medical

1 expert testimony ordered by the Appeals Council. Nicholas and his
2 parents testified. On September 27, 2002, ALJ Kingrey issued a
3 decision finding that Nicholas did not satisfy the criteria for
4 childhood SSI disability at any point between September 25, 1997
5 and the date of her decision. On December 11, 2003, the Appeals
6 Council denied Nicholas's request for review, thereby making ALJ
7 Kingrey's decision the final decision of the Commissioner.

8 **Medical Evidence**

9 Nicholas was born on May 25, 1985. On July 1, 1990, while
10 riding a bicycle, Nicholas was hit by a van. He suffered a closed
11 head injury, with cerebral contusion and linear skull fracture, and
12 was in a coma for four days. Tr. 440. After the accident, he had
13 episodic loss of vision in the left eye, was highly susceptible to
14 fatigue, and was reported to be uneasy in group situations. Tr.
15 446. His parents reported that he was also more emotionally labile.

16 Nicholas was evaluated by psychologist Edwin Pearson, Ph.D in
17 September and October 1992. Tr. 445. Dr. Pearson administered,
18 among other tests, the Wechsler Intelligence Scale for Children
19 (WISC-R),¹ and the Wide Range Achievement Test, 1984 edition, Level
20 1 (WRAT). The test data indicated that Nicholas's intellectual
21 functioning was in the average range, with a verbal IQ of 88, a
22 performance IQ of 106, and a full scale IQ of 96. Tr. 447. His
23 academic abilities, as indicated on the WRAT, were unevenly

24
25 ¹ The parties agree that Dr. Pearson administered a version
26 of the WISC-R that was a year out of date in 1992. The WISC-R was
27 developed in 1974, and the WISC-III became available in 1991. It
28 is recommended that psychologists adopt the new testing method
within one year of its issuance. The WISC-III was superseded in
2003 by the WISC-IV. See Defendant's Memorandum in Support of
Remand, at 7, n. 6.

1 developed: reading and spelling scores were in the mid- to upper
2 first grade level, but his arithmetic scores were below first grade
3 level, in the first percentile.

4 Dr. Pearson noted attentional problems "virtually throughout
5 all areas tested." Tr. 449. Nicholas had difficulty listening
6 quietly to instructions and maintaining attention; he was easily
7 distracted. Id. Tests of immediate auditory and visual memory
8 showed erratic performance. Id. Dr. Pearson concluded that Nicholas
9 had 1) moderate deficit in attentional control and concentration,
10 with moderate to severe vulnerability to distraction; 2) moderate
11 difficulties in learning and retaining new information, being
12 highly erratic in his efforts to assimilate new information; 3)
13 mild visuographic deficit; 4) moderate deficits in novel problem
14 solving and higher reasoning; and 5) moderate deficits of frontal
15 lobe/executive function nature, including perseveration,
16 impulsivity and emotional lability. Dr. Pearson also found other
17 problems such as urinary urgency, episodic lower left extremity
18 dyscontrol, episodic loss of vision in the left eye, fatigue,
19 episodic depression, loss of self-esteem, and a need to withdraw
20 from group peer activities because they were overstimulating and
21 confusing. Tr. 451-52.

22 On January 13, 1993, a Social Security medical consultant,
23 Mary Ann Westfall, M.D., wrote that two years after the closed head
24 injury, Nicholas

25 has not progressed cognitively since that point - has
26 wide variance in academic skills acquisition, e.g., math
27 vs. reading & comprehension - exhibits inconsistency in
28 approaches to problem solving, demonstrating continued
ADHD characteristics - will continue to do so in future -
will not be at peer level (cognitively, or grade level).

1 Tr. 77.

2 Dr. Pearson evaluated Nicholas again on July 28, 1997, after
3 he completed fifth grade. Tr. 440-44. He again administered the
4 WISC-R (now six years out of date) and the WRAT, along with other
5 neuropsychological tests. On the WISC-R, Nicholas obtained verbal,
6 performance, and full scale IQ scores of 81, 88 and 84,
7 respectively. His academic skills on the WRAT were at third grade
8 level for reading and spelling and at the lower sixth grade level
9 on arithmetic. Dr. Pearson concluded that these tests indicated
10 borderline intellectual functioning and a cognitive disorder. Tr.
11 444. Dr. Pearson thought Nicholas also had Attention
12 Deficit/Hyperactivity Disorder (ADHD). During testing, Nicholas was
13 restless, impulsive, inattentive, and easily distracted. Id.

14 A report from Nicholas's teacher, dated May 19, 1998,
15 described him as "short attention, no focus, easily distracted,"
16 and said that he was able to remain on task only about three to
17 five minutes before becoming distracted or needing redirection. Tr.
18 291. The teacher reported that Nicholas was disruptive during class
19 times, did not learn new skills at the same pace as his peers, and
20 did not react appropriately with his peers. Tr. 291-92. He was
21 described as acting without thought, being impulsive, unruly,
22 overactive, very busy, aggressive, and loud. Tr. 292.

23 Nicholas's school records from Brixton Junior High School show
24 that on November 9, 1998, Nicholas was disciplined for harassment
25 after he made inappropriate sexual comments to a girl student. Tr.
26 505. On March 5, 1999, Nicholas was disciplined for bringing a
27 squirt gun to his P.E. class. On March 30, 1999, Nicholas was
28 disciplined for disruptive behavior and harassment, after he

1 provoked his friend into punching another student. Tr. 502. On
2 April 2, 1999, Nicholas received a referral for failing to report
3 to detention after school on April 1, 1999. Tr. 501. On April 4,
4 1999, Nicholas's parents were notified that Nicholas had
5 accumulated an excessive number of absences from class. Tr. 498. On
6 April 16, 1999, Nicholas was suspended from school for fighting.
7 Tr. 499. On April 26, 1999, he received a referral for
8 insubordination after he refused to participate in class. Tr. 497.
9 On May 3, 1999, he was suspended for slapping a girl in the face.
10 Tr. 496. A grade report dated August 30, 1999, when Nicholas had
11 completed the eighth grade, shows that Nicholas received grades of
12 D- and F in English, an F in literature, two Fs in math, a C and an
13 F in social studies, a D- in science, and a D in health. His
14 cumulative grade point average was 1.286. Tr. 667.

15 On November 4, 1999, the principal of Ponderosa Junior High
16 School notified Nicholas's parents of evaluation results in
17 connection with the provision of Section 504 services. Tr. 543. He
18 wrote:

19 The committee concluded that Nick is having a difficult
20 time staying focused in class. He has a tendency to get
21 off task and is easily distracted. It was noted that Nick
22 seems to experience most of his success when he is
23 separated in the class from his "friends." He works
better and completes assignments when this occurs. For
the most part, Nick has difficulty in completing his
assignments and often comes unprepared for class. This
contributes to his reduction in grades in his classes.

24 Tr. 544.

25 A summary of student discipline involving Nicholas for the
26 1999-2000 school year shows detentions on September 15, 1999, for
27 disturbing class; on September 17, 1999, for "other;" on October 6,
28 1999, for disturbing class; on October 7, 1999, for "other;" on

1 December 16, 1999, for attendance; on February 10, 2000, for
2 inappropriate language; on February 18, 2000, for insubordination;
3 on May 2, 2000, for "other;" and on May 4, 2000, for lewd conduct.
4 Tr. 672.

5 In February 2000, Stephen Tibbitts, Ph.D. was called to
6 testify as a medical expert at Nicholas's first hearing before ALJ
7 Schloss. Tr. 838-44. He reviewed Dr. Pearson's 1997 report. When
8 asked to assess the impairments indicated by Dr. Pearson's report,
9 Dr. Tibbitts stated that the report showed a "marked" impairment in
10 concentration, persistence and pace, but "less than marked"
11 limitations in personal attainment, cognitive and communication
12 skills, and social realm. Tr. 838-39.

13 Dr. Tibbitts evaluated Nicholas on July 27, 2000. Tr. 709-13.
14 He administered the WISC -III and a group of achievement tests
15 called the MBA tests. The WISC-III yielded a verbal IQ score of 69
16 (second percentile), a performance IQ of 73 (fourth percentile) and
17 a full scale IQ of 69 (second percentile). According to Dr.
18 Tibbitts, the verbal and full scale scores fell within the mentally
19 retarded range and the performance scale fell in the borderline
20 range. Tr. 711. The difference between his verbal and performance
21 scores "was not significant." Id. The sub-test scaled scores were
22 "fairly consistent at the low level." Id.

23 Additional analysis of the WISC-III data showed that Nicholas
24 was also experiencing "significant problems" across all four
25 cognitive realms: verbal comprehension, perceptual organization,
26 freedom from distractibility, and processing speed.

27 The MBA scores, when estimated at grade level, were grade 4.5
28 for basic skills, grade 5.6 for reading, grade 3.3 for writing, and

1 grade 5.3 for mathematics. At the time of the testing, Nicholas's
2 actual grade level was 8.9. Tr. 712. Dr. Tibbitts also noted,

3 Nicholas appeared to have age appropriate activities of
4 daily living. His grooming and hygiene were appropriate
5 and he is able to participate in some household
6 responsibilities. He appeared to have serious problems in
7 his social functioning, with a tendency to have
8 difficulty with both peers, as well as adult authority
9 figures. Reports from his school indicated that he
10 generally is confrontive and has received numerous
detention referrals for hitting and throwing. His
concentration, persistence and pace appeared to be
seriously impaired. He has difficulty with [his] auditory
attention and concentration and is significantly below
grade level in his academic achievement. Behavioral
problems appear primarily in the area of anger and acting
out behaviors.

11 Id. Dr. Tibbitts diagnosed Mild Mental Retardation and Disruptive
12 Behavior Disorder, Not Otherwise Specified (NOS).

13 According to a report completed on November 7, 2000, by a
14 counselor at Mazama High School, Nicholas was able to maintain
15 concentration during "seat work" periods; was not disruptive during
16 class time, reacted appropriately to peers, followed rules and
17 directions appropriately, and socialized well between classes or at
18 lunch. Tr. 639-41. However, the counselor also noted, "I also
19 notice very low (single digit) %ile scores on achievement tests."
20 Tr. 642.

21 A reviewing physician for Social Security Administration,
22 Frank Lahman, Ph.D., who was consulted on November 17, 2000, opined
23 on the basis of the November 7, 2000 report that

24 The claimant is performing at the 9th grade level. His
25 504 plan is reportedly based on "extreme/serious medical
26 circumstances." Evidence at the time of the initial eval
[sic] showed achievement to be at the borderline level.
27 ... Based on the claimant's adaptive functioning, school
achievement and collective test results, the [diagnosis]
of Borderline Intellectual Function is more appropriate
than the Mild Mental Retardation that Dr. Tibbitts [sic]
28 concluded. The school principal's letter of 11/4/99 noted

1 that the claimant had a difficult time staying focused in
2 class and was easily distracted. The current teacher
3 report reflects improvement in this domain so I have
reduced the severity on CPP [concentration, persistence
and pace] to "Less than Marked."

4 Tr. 715.

5 A grade transcript dated September 4, 2001, shows that for the
6 latter half of the 2000-2001 school year, Nicholas's grade point
7 average was 1.5. Tr. 751. However, for the first half of the 2001-
8 2002 school year, his grade point average had risen to 2.167. Id.

9 A school report dated January 16, 2002, when Nicholas was a
10 sophomore in high school, stated that he was on an Individual
11 Education Plan and needed support in the Resource Room to be
12 successful in mainstream classes. Tr. 743. At that time test
13 results indicated that he was functioning at grade 6.7 in math, 6.5
14 in reading, and 4.6 in written language skills. Id. Although he was
15 in an algebra class, Nicholas was having difficulties with
16 "fractions, percentages, and story problems." Id.

17 During 1992 and 1993, and again in 1997, Nicholas was treated
18 by neurologist Michael S. Narus, D.O., and by Charles D. Bury,
19 M.D., with Ritalin. However, the treatment was not successful.
20 Nicholas was started on Prozac in 1998, tr. 134, and then on Cylert
21 in 1999. Tr. 477. However, in 1998, pediatric neurologist Steven
22 Ireland, M.D., wrote that he doubted "medical therapy will be
23 terribly effective in either helping with his academic performance
24 or controlling his behavior," because Nicholas's problems were
25 related to a post-traumatic encephalopathy. Tr. 474.

26 On March 26, 1998, Nicholas's family physician, Charles A.
27 Huibregtse, M.D., Ph.D., made an incidental finding of marked
28 dextroscoliosis in the upper thoracic spine from about T1-T7. Tr.

1 479. Physical examination revealed a prominent hump on the right
2 upper back, the right shoulder sitting higher than the left when
3 standing straight. Id. On flexion, his spinous processes made a
4 definite curve to the right in the upper spine. Id.

5 Dr. Huibregtse referred Nicholas to Karl C. Wenner, M.D., an
6 orthopedist, for evaluation of scoliosis. Tr. 729. Nicholas was
7 found to have a significant thoracolumbar double curve, with the
8 larger being the thoracic, measuring roughly 32-35°. Id. On March
9 30, 1998, Dr. Wenner wrote:

10 I am concerned that this is not idiopathic scoliosis
11 because of his age and presentation. Scoliosis is much
12 more common in females, and when it occurs in males it is
13 not usual for me to see it at this age. I am concerned
14 that there is some other process going on, and I wonder
15 if it may in some way be related to his head injury with
16 some neurological sequela that I am not able to pick up.
In any event, I think he is going to need to be treated
regardless of the etiology... and because of my concerns
I am referring him to Shriner's ... and have him
evaluated there at the Scoliosis Clinic. I suspect at the
very least he will require bracing, and possibly may be
a surgical candidate, given his young age.

17 Tr. 454.

18 At Shriners, Nicholas was fitted for a Milwaukie brace. Tr.
19 462. He was told by Michael Aiona, M.D., an orthopedist, that he
20 needed to wear the brace 23 hours a day until he reached skeletal
21 maturity at the age of 16 or 17. Tr. 459.

22 On December 5, 1998, Nicholas was seen by Dr. Aiona and James
23 Policy, M.D., for complaints of pain from the brace. It was noted
24 that the brace was "much too tight" and Dr. Policy recommended that
25 the brace be refitted or replaced. Tr. 507.

26 On January 13, 1999, Nicholas complained of back pain over the
27 last two or three weeks while wearing the brace. Tr. 511. Physical
28 examination revealed tenderness to palpation in the trapezius

1 muscle on the right and along the vertebral column. Range of motion
2 was limited and bending forward caused pain. Id.

3 On July 9, 1999, Dr. Aiona reported in a letter that Nicholas
4 had been followed for a curvature of the spine which had progressed
5 from 31 degrees to 40 degrees in the previous six months. Tr. 516.
6 He noted that the brace affected some of Nicholas's physical
7 activities, as it limited truncal and pelvic motion. Id. Dr. Aiona
8 indicated that depending on his progress, Nicholas might be a
9 candidate for spine surgery in the future. Id.

10 On January 27, 2000, an x-ray showed that Nicholas's thoracic
11 dextroscoliosis had increased from 40 to 44 degrees. Tr. 726. On
12 February 9, 2000, an MRI showed an intradural extraaxial cystic
13 lesion at T1, compressing the spinal cord with posterior and
14 rightward displacement of the cord. Tr. 725.

15 On February 19, 2000, Dr. Aiona stated in a letter that
16 Nicholas had continued to have progression of the scoliosis despite
17 brace treatment, and that he had what was probably a cystic lesion
18 causing pressure on his spinal cord. Tr. 548. Dr. Aiona thought the
19 lesion would require neurosurgical evaluation and treatment, as
20 well as affecting the overall treatment of his scoliosis. His
21 diagnoses at that time were scoliosis and probable arachnoid cyst,
22 causing functional problems with back pain, the need for bracing,
23 and possible surgical intervention. Id.

24 On April 14, 2000, Nicholas saw Joseph Piatt, M.D., a
25 neurosurgeon. Tr. 706. After examination, Dr. Piatt noted an
26 impression of ventral spinal cyst with deformation of the spinal
27 cord and progressive scoliosis. Id. Dr. Piatt thought the cyst was
28 either an arachnoid cyst or a neurenteric cyst. Id. Dr. Piatt

1 recommended excision of the cyst for biopsy and for "whatever
2 benefit spinal cord decompression may have with respect to
3 Nicholas' scoliosis." Id.

4 In November 2000, the cystic tumor was removed by Nate Selden,
5 M.D. Tr. 697-98, 732, 736. On December 14, 2000, six weeks after
6 surgery, Nicholas was examined by Dr. Krajbich and Elaine Jeffress,
7 RN. Upon examination, some tenderness was noted with mild palpation
8 around both scapular regions, along with some numbness of the
9 chest. X-rays showed that Nicholas's spinal curve was 36°. Tr. 735.
10 It was felt that his scoliosis had improved since removal of the
11 cyst. Tr. 736.

12 On November 8, 2001, Nicholas was seen by Patrick Dawson, M.D.
13 at Shriner's Hospital. Dr. Dawson noted that he had full forward
14 flexion and extension of the spine and good rotation. Tr. 732. He
15 had a notable scoliotic curve, but full range of motion and good
16 strength in all extremities. X-rays showed his spinal curve at 43°.
17 Id. He was referred to a physical therapist for back exercises to
18 help with the mid-thoracic back pain. Id.

19 On July 11, 2002, Dr. Krajbich noted that Nicholas had a 43°
20 upper thoracic curve which was "somewhat symptomatic, but not too
21 dramatically." Tr. 753. His curvature had been "stable for the past
22 little while," but Dr. Krajbich planned to see him again in six to
23 eight months to see if he would require surgical procedure for
24 correction. Id.

25 **Hearing Testimony**

26 Nicholas testified at the hearing that he had completed his
27 sophomore year of high school, with grades including two Ds, an F
28 and "a couple of Cs." Tr. 765. He spends five hours a week in a

1 special education class, in which he gets academic help. Tr. 768.
2 The previous year, he had taken a regular algebra class, getting Cs
3 and a D; Nicholas attributed the D to not turning in all his
4 assignments. Tr. 769. He said he got a D or an F in biology, not
5 for failing to turn in assignments, but because the class was
6 beyond his abilities. Tr. 769-70. He got Bs in English and social
7 studies. Tr. 770. During his leisure time, he watches television
8 and plays video games. Tr. 771-72.

9 Nicholas testified that he fails to turn in assignments
10 because "either I don't know how to do it, or I get discouraged."
11 Tr. 773. He said he gets discouraged after 15 or 20 minutes. Id.
12 He has not participated in sports since the eighth grade because
13 "my back hurts too bad." Tr. 777. He testified that when he was
14 wearing the brace he could not bend over to tie his shoe. Tr. 779.

15 Nicholas's father testified that Nicholas's physical
16 activities, such as walking, are limited by pain, and that he was
17 frequently going to the nurse's office at school for Tylenol. Tr.
18 787. Nicholas takes his father's pain medication. Id. He said
19 Nicholas does not pay attention or concentrate very well. Tr. 792.

20 Nicholas's mother testified Nicholas stays home a lot, playing
21 video games, spending the majority of his day in his room. Tr. 800.
22 She said he also has learning difficulties and gets frustrated and
23 upset with school work. Tr. 802. He often does his homework in a
24 resource room. Tr. 803.

25 **ALJ's Decision**

26 The ALJ found that Nicholas has severe impairments that
27 include ADHD, borderline IQ, and serious scoliosis complicated by
28 the presence of a spinal cyst. Tr. 25. She further found that

1 Nicholas exhibited certain mental difficulties including
2 substandard academic performance, attention and concentration
3 deficits, and anger and impulse control problems.

4 The ALJ found that Nicholas did not suffer serious functional
5 consequences resulting from his spinal abnormality. Id. She
6 concluded that the scoliosis did not meet or equal the orthopedic
7 impairments listed in Sections 1.00 and 101.00 of the Appendix, or
8 cause a "marked" impairment in any functional sphere. Tr. 26.

9 The ALJ found that the "record on balance" did not support Dr.
10 Tibbitts' 2000 diagnosis of mild mental retardation, and concluded
11 that Dr. Pearson's 1997 findings, with scores at the upper end of
12 the "borderline" range, should be applied. Tr. 26. The ALJ found
13 that the verbal and full scales on the 2000 IQ test, at 69, were
14 only one point below mild mental retardation scale, within the
15 "typical range of standard deviation in such tests [of] plus or
16 minus two or three points." Id. The ALJ also found Dr. Tibbitts'
17 diagnosis to be inconsistent with his own note that Nicholas was
18 able to attend to grooming and hygiene, perform household chores
19 and other family responsibilities, and engage in age-appropriate
20 activities. Id.

21 The ALJ thought the "plausible explanation" for the difference
22 between IQ test results in 1997 and 2000 was Nicholas's "variable
23 attention and concentration related to his attention deficit
24 hyperactivity disorder." She found no indication in Dr. Tibbitts'
25 report that Dr. Tibbitts knew of Nicholas's diagnosis of ADHD;
26 this, in combination with Nicholas's hearing testimony that he went
27 off his ADHD medication during the summer and the fact that Dr.
28 Tibbitts tested Nicholas in the summer, led the ALJ to conclude

1 that Dr. Tibbitts' examination was not "an accurate depiction of
2 the claimant's abilities, but rather reflects the hiatus in the
3 claimant's medication." Tr. 27. The ALJ thought "[t]his is
4 confirmed by the claimant's grade level testing which advanced a
5 full grade level from the time of Dr. Tibbitts' examination to six
6 months later after medication had been resumed." Id.²

7 The ALJ noted that the agency's reviewing sources had not
8 endorsed a diagnosis that Nicholas suffered from mild mental
9 retardation, concluding that borderline intellectual functioning
10 was a more appropriate diagnosis. Id.

11 The ALJ disbelieved the testimony of Nicholas and his parents,
12 finding that they "overstate[d] the nature and severity" of
13 Nicholas's physical problems. The ALJ based this finding on Dr.
14 Selden's note of July 11, 2002, in which Nicholas reported a "poor
15 tolerance to sports." The ALJ found that this indicated that
16 Nicholas had not "ceased such activities." Tr. 28. The ALJ also
17 noted a November 8, 2001 chart note from Dr. Selden in which he
18 said Nicholas was "doing well with full function. There are no
19 problems with gait, running, or lower extremity function." Id.

20 The ALJ further found that although Nicholas had scoliosis,
21 "which is degenerative," the condition "is progressing very slowly
22 and there does not appear to have been any significant change in
23 the claimant's underlying medical pathology between November 2001
24 and July 2002 that might account for the significant increase in
25

26 ² The ALJ provided no citation to the record to support this
27 finding. The record shows that Nicholas did advance a full grade
28 level between July 2000 and January 2002, but the interval
between tests was 18 months, not six months.

1 subjective complaints he reports." Id. For this reason, the ALJ did
2 not find the testimony about Nicholas's motor functioning to be
3 "entirely persuasive."

4 And finally, the ALJ found that even if Nicholas's complaints
5 were accepted as generally credible, "his allegations do not
6 indicate a 'marked' level of physical impairment. The claimant is
7 able to attend school, bathe and dress himself, and otherwise carry
8 out routine age-appropriate activities in an independent manner."
9 Id.

10 **Standards**

11 When evaluating disability for children, the Commissioner is
12 required to determine whether the child has a medically
13 determinable impairment that meets, medically equals, or
14 functionally equals one of the impairments in the Listing found at
15 Part 404, Subpart P, Appendix 1. 20 C.F.R. § 416.924(d). Functional
16 limitations comprise the following six domains: 1) acquiring and
17 using information; 2) attending and completing tasks; 3)
18 interacting and relating with others; 4) moving about and
19 manipulating objects; 5) caring for oneself; and 6) health and
20 physical well-being. 20 C.F.R. § 416.926a(b)(1)(i)-(vi). A
21 medically determinable impairment or combination of impairments
22 functionally equals a listed impairment if it results in "marked"
23 limitations in two domains of functioning or an "extreme"
24 limitation in one domain. 20 C.F.R. § 416.926a(e)(2). A "marked"
25 limitation will be found in a domain when the impairment
26 "interferes seriously with" a claimant's ability to independently
27 initiate, sustain, or complete activities. (e)(2)(i).

28 The decision whether to remand for further proceedings turns

1 upon the likely utility of such proceedings. Harman v. Apfel, 211
2 F.3d 1172, 1179 (9th Cir. 2000). A remand for further proceedings
3 is unnecessary if the record is fully developed and it is clear
4 from the record that the ALJ would be required to award benefits.
5 Holohan v. Massinari, 246 F.3d 1195, 1210 (9th Cir. 2000). In cases
6 in which it is evident from the record that benefits should be
7 awarded, remanding for further proceedings would needlessly delay
8 effectuating the primary purpose of the Social Security Act-i.e.,
9 to give financial assistance to disabled persons because they
10 cannot sustain themselves. Id.

11 In Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996), the
12 court held that improperly rejected evidence should be credited and
13 an immediate award of benefits be made when: 1) the ALJ has failed
14 to provide legally sufficient reasons for rejecting such evidence,
15 2) there are no outstanding issues that must be resolved before a
16 determination of disability can be made, and 3) it is clear from
17 the record that the ALJ would be required to find the claimant
18 disabled were such evidence credited.

19 If the Smolen test is satisfied, then remand for payment of
20 benefits is warranted regardless of whether the ALJ *might* have
21 articulated a justification for rejecting the doctor's opinion.
22 Harman at 1173 (emphasis in original).

23 **Discussion**

24 The Commissioner concedes that the ALJ failed to comply with
25 the Appeals Council's order that she obtain supplemental medical
26 expert testimony to clarify the nature and severity of Nicholas's
27 impairments and to help determine whether they met, medically
28 equaled, or functionally equaled one of the listed impairments.

1 However, she asserts that the record, as it stands, does not
2 require a finding of disability "given the uncertain implication of
3 the unresolved issues." Defendant's Memorandum, p. 8. The
4 Commissioner does not concede error with respect to the ALJ's
5 consideration of Nicholas's functional limitations, or the
6 testimony of Nicholas and his parents. Id.

7 Mr. Jenkins contends that the ALJ's decision must be reversed
8 for an award of benefits because the ALJ erred in refusing to find
9 that Nicholas has Mild Mental Retardation, and in failing to find
10 that Nicholas meets, equals, or functionally equals a listed
11 impairment. Mr. Jenkins asserts that Nicholas's impairments meet or
12 functionally equal Listing 112.05, Mental Retardation:

13 Characterized by significantly subaverage general
14 intellectual functioning with deficits in adaptive
15 functioning. The required level of severity for this
16 disorder is met when the requirements in A, B, C, D, E,
17 or F are satisfied.

* * *

16 D. A valid verbal, performance, or full scale IQ of 60
17 through 70 and a physical or other mental impairment
18 imposing an additional and significant limitation of
19 function, or

18 E. A valid verbal, performance, or full scale IQ of 60
19 through 70 and:

20 2. For children (age 3 to attainment of age 18)
21 resulting in at least one of paragraphs B2b or B2c or B2d
22 of 112.02.

21 Paragraphs B2b, B2c, and B2d of § 112.02 provide:

22 b. Marked impairment in age-
23 appropriate social functioning,
24 documented by history and medical
25 findings (including consideration of
26 information from parents or other
27 individuals who have knowledge of
28 the child, when such information is
needed and available) ... or

c. Marked impairment in age-
appropriate personal functioning,
documented by history and medical
findings (including consideration of

1 information from parents or other
2 individuals who have knowledge of
3 the child, when such information is
4 needed and available) and including,
5 if necessary, appropriate
6 standardized tests; or
7 d. Marked difficulties in
8 maintaining concentration,
9 persistence, or pace.

10 Mr. Jenkins contends that Nicholas's IQ testing satisfies
11 Listing 112.05's requirement of scores between 60 and 70, and Dr.
12 Tibbitts' opinion that Nicholas has marked difficulties in
13 maintaining concentration, persistence and pace, along with the
14 ALJ's finding that Nicholas also has "severe" impairments in the
15 form of ADHD and scoliosis satisfy the second requirement.

- 16 1. Did the ALJ err in finding that Nicholas's mental
17 impairment was borderline intellectual functioning rather
18 than mild mental retardation?

19 The Commissioner acknowledges that ALJ Kingrey erred by
20 failing to comply with the Appeals Council's order that she obtain
21 supplemental medical expert testimony, but does not concede error
22 in the ALJ's finding that Nicholas's mental impairment was
23 borderline intellectual functioning rather than mild mental
24 retardation. ALJ Kingrey's finding of borderline intellectual
25 functioning was premised on her rejection of Dr. Tibbitts's
26 findings and on her adoption of the findings of Dr. Pearson.

27 Under Social Security regulations, IQ test results must be
28 current for accurate assessment under Listing 112.05. 20 C.F.R. Pt.
404, Subpt. P, App. 1, 112.00(D)(10):

Generally, the results of IQ tests tend to stabilize by
the age of 16. Therefore, IQ test results obtained at age
16 or older should be viewed as a valid indication of the
child's current status, provided they are compatible with
the child's current behavior. IQ test results obtained
between ages 7 and 16 should be considered current for 4

1 years when the tested IQ is less than 40, and for 2 years
2 when the IQ is 40 or above.

3 Id. (emphasis added). Under this regulation, Dr. Pearson's 1997 IQ
4 test results were only current for two years, or until 1999,³ while
5 Dr. Tibbitts' test results were current until 2002. ALJ Kingrey's
6 adoption of Dr. Pearson's invalid test results was legally
7 erroneous.

8 I also find error in ALJ Kingrey's rejection of Dr. Tibbitts'
9 IQ test results. She concluded that Nicholas's IQ test results were
10 not indicative of mild mental retardation because the verbal and
11 full scales of 69 were only one point below the cut-off for mild
12 mental retardation, leading her to find that they were within the
13 "typical range of standard deviation in such tests [of] plus or
14 minus two or three points." However, the ALJ does not cite, and I
15 have been unable to find, any legal authority permitting the ALJ
16 unilaterally to raise IQ scores by two or three points. Further,
17 the ALJ's finding is directly contradicted by Dr. Tibbitts'
18 statement in his report that the difference between Nicholas's
19 verbal and performance scores "was not significant" because the
20 sub-test scaled scores were "fairly consistent at the low level."

21 The ALJ's other stated reason for rejecting the findings of
22 Dr. Tibbitts was that she thought the lower scores obtained by Dr.
23 Tibbitts in July 2000 were the result of Nicholas's having gone off
24 his ADHD medications in the summer. To support this finding, the
25 ALJ pointed to the alleged increase in Nicholas's achievement by a
26 full grade level six months later. There is no evidence in the

27 ³ The fact that the IQ test itself was significantly out of
28 date further weakens the validity of Dr. Pearson's results.

1 record to support this finding. First, Dr. Pearson's IQ test
2 results were also obtained in July. Second, pediatric neurologist
3 Dr. Ireland concluded, after Ritalin therapy proved ineffective,
4 that he did not think medical therapy would be "terribly effective"
5 in assisting Nicholas with either academic performance or
6 controlling his behavior, because his problems were based on
7 encephalopathy. And third, as discussed below, Nicholas's
8 advancement of a full grade level occurred 18 months after Dr.
9 Tibbitts' testing, not six months later.

10 The ALJ's finding that Nicholas's mental impairment was at the
11 Borderline rather than Mild Mental Retardation level was also based
12 on the comments of reviewing psychologist Frank Lahman. Dr. Lahman
13 opined, on the basis of the November 7, 2000 report from Nicholas's
14 counselor, that Nicholas was "performing at the 9th grade level."
15 Tr. 715. However, Dr. Lahman is clearly in error: not only is this
16 statement contradicted by the results of the achievement tests
17 administered by Dr. Tibbitts only four months previously (basic
18 skills at fourth grade level, reading skills at fifth grade level,
19 writing skills at third grade level, mathematics skills at fifth
20 grade level), it is contradicted by Nicholas's achievement tests 18
21 months later, in 2002, which show him functioning at sixth grade
22 level in math and reading and fourth grade level in written
23 language skills.

24 Because the ALJ's rejection of Dr. Tibbitts' findings and
25 opinions are legally erroneous and not based on substantial
26 evidence in the record, the question is whether Dr. Tibbitts'
27 report should be credited as true.

28 In general, when the evidence is strongly in the claimant's

1 favor and the equities are against further delay, the court should
2 apply this prudential rule. See Lester v. Chater, 81 F.3d 821, 834
3 (9th Cir. 1996) (court credited treating opinion as true where an
4 abundance of evidence supported that interpretation and where
5 claimant had waited 12 years for resolution of the claim). In
6 Harman, 211 F.3d at 1178-79, the court rejected the Commissioner's
7 argument that when the record contains evidence capable of
8 supporting the rejection of medical opinions, the court should not
9 accept such medical evidence as true. The court noted language from
10 Varney v. Secretary of Health and Human Services (Varney II), 859
11 F.2d 1396, 1398-99 (9th Cir. 1988), where the court held that a
12 claimant's pain testimony must be accepted as true when it is
13 inadequately rejected by the ALJ, and held that the reasoning was
14 equally applicable to medical evidence:

15 Requiring the ALJs to specify any factors discrediting a
16 claimant at the first opportunity helps to improve the
17 performance of the ALJs by discouraging them from
18 reach[ing] a conclusion first, and then attempt[ing] to
19 justify it by ignoring competent evidence [And] the
20 rule [of crediting such testimony ensures that deserving
21 claimants will receive benefits as soon as possible
22 Certainly there may exist valid grounds on which to
23 discredit a claimant's pain testimony But if grounds
24 for such a finding exist, it is both reasonable and
25 desirable to require the ALJ to articulate them in the
26 original decision.

27 I conclude that under this standard, the opinions of Dr.
28 Tibbitts should be credited as true. ALJ Kingrey was ordered by the
29 Appeals Council to obtain supplemental medical evidence, but failed
30 to do so. She then failed to give proper reasons for rejecting the
31 opinions of Dr. Tibbitts, the medical expert from the earlier
32 hearing. If there are valid grounds on which to reject Dr.
33 Tibbitts's opinions, the Commissioner has now had two opportunities

1 to discover them. It would be inequitable to the claimant to give
2 the Commissioner yet another opportunity. See Benecke v. Barnhart,
3 379 F.3d 587, 595 (9th Cir. 2004) ("Allowing the Commissioner to
4 decide an issue again would create an unfair 'heads we win; tails,
5 let's play again' system of disability benefits adjudication.")

6 Crediting Dr. Tibbitts' opinions means that Nicholas has
7 satisfied the first requirement of Listing 112.05, which is a valid
8 verbal, performance, or full scale IQ score of 60 through 70.

9 I turn now to the question of whether there remains an
10 outstanding issue on whether, in addition to the valid IQ scores,
11 Nicholas has a physical or other mental impairment imposing an
12 additional and significant limitation of function, or,
13 alternatively, one of the following: 1) marked impairment in age-
14 appropriate social functioning, documented by history and medical
15 findings; or 2) marked impairment in age-appropriate personal
16 functioning; or 3) marked difficulties in maintaining
17 concentration, persistence, or pace.

18 Dr. Tibbitts testified at the February 2000 hearing that
19 Nicholas had had a "marked" impairment in concentration,
20 persistence and pace since the date of Dr. Pearson's evaluation.
21 The ALJ gave no reason for rejecting Dr. Tibbitts' opinion. I
22 therefore recommend that it be credited as true.⁴

23 Further, the ALJ herself found that Nicholas was impaired by
24 ADHD. The diagnostic criteria of ADHD describe deficiencies in
25

26 ⁴ Dr. Tibbitts' opinion is supported by Nicholas's score of
27 69 on the Freedom from Distractibility Index, of the WISC-III, a
28 score that is at the 2nd percentile, two standard deviations
below the mean for that test. Tr. 711.

1 concentration, persistence and pace. They include "often" 1)
2 failing to give close attention to details or making careless
3 mistakes in schoolwork, work, or other activities; 2) having
4 difficulty sustaining attention in tasks; 3) failing to follow
5 through on instructions and failing to finish schoolwork; 4) having
6 difficulty organizing tasks and activities; 5) avoiding, disliking,
7 or being reluctant to engage in tasks that require sustained mental
8 effort; and 6) being easily distracted by extraneous stimuli.
9 American Psychiatric Association, Diagnostic and Statistical Manual
10 of Mental Disorders (4th ed. Text Revision) 92 (DSM-IV).

11 This evidence meets the requirements of Listing 112.02B(2) (d),
12 and therefore satisfies the second prong of Listing 112.05.

13 2. Are the ALJ's credibility findings valid?

14 Once a claimant shows an underlying impairment and a causal
15 relationship between the impairment and some level of symptoms,
16 clear and convincing reasons are needed to reject a claimant's
17 testimony if there is no evidence of malingering. Smolen, 80 F.3d
18 at 1281-82.

19 A claimant's testimony about pain may be disregarded if it is
20 unsupported by medical evidence which supports the *existence* of
21 such pain, although the claimant need not submit medical evidence
22 which supports the *degree* of pain. Bunnell v. Sullivan, 947 F.2d
23 341, 347 (9th Cir. 1991) (en banc). See also Vertigan v. Halter, 260
24 F.3d 1044 (9th Cir. 2001) (fact that claimant's testimony not fully
25 corroborated by objective medical findings, in and of itself, is
26 not clear and convincing reason for rejecting it).

27 The ALJ's rejection of the testimony from Nicholas and his
28 parents about pain because it was "there does not appear to have

1 been any significant change in the claimant's underlying medical
2 pathology between November 2001 and July 2002 that might account
3 for the significant increase in subjective complaints" falls afoul
4 of this rule. The record amply demonstrates that Nicholas has a
5 condition, scoliosis, a condition which causes pain. Nicholas is
6 not required to provide objective medical evidence for the degree
7 of pain he alleges-- he is only required to show, as he has, the
8 existence of a condition which could reasonably be expected to
9 cause some pain. The ALJ's finding on this basis was erroneous.

10 When making her findings, the ALJ is required to read the
11 statements of physicians in the context of the overall diagnostic
12 picture, reading the notes in full and in context. Holohan, 246
13 F.3d at 1205. The ALJ rejected the testimony of Nicholas and his
14 parents on the basis of two notes from Dr. Selden, the surgeon who
15 removed Nicholas's tumor. The first note was dated November 8,
16 2001, shortly after Dr. Selden removed the spinal tumor, and states
17 that Nicholas is "doing well with full function. There are no
18 problems with gait, running, or lower extremity function." However,
19 Dr. Selden's note continues: "He does have some occasional
20 interscapular pain, for which he is not taking any medication." Tr.
21 731.

22 Dr. Selden's November 2002 chart note, a year post-surgery,
23 also contains some additional comments, not quoted by the ALJ:
24 "[A]lthough he complains of generalized poor tolerance to sports,
25 mostly related to mid and low thoracic pain, he is having no focal
26 or frank weakness ever since surgery. ... If spinal fusion is
27 needed for his progressive low thoracic pain and spinal deformity,
28 it would be okay for them to proceed with this." Tr. 752. Clearly

1 Dr. Selden was convinced of the pain's existence enough to consider
2 surgery a viable treatment option. Further, the record reflects
3 that Nicholas's scoliotic curve re-progressed from 36° after the
4 surgery, a significant improvement, to 43°.

5 The ALJ's findings do not reflect Dr. Selden's notes in full
6 and in context. Moreover, when the entire medical record is
7 analyzed, there is no substantial evidence to support the ALJ's
8 finding that Nicholas's testimony about pain and limitations caused
9 by the back brace was not credible. See, e.g., tr. 459 (Nicholas
10 required to wear back brace 23 hours a day until he attained
11 skeletal maturity); tr. 507 (complaint of pain from brace on
12 December 5, 1998); tr. 511 (complaint of pain from brace on January
13 13, 1999); tr. 511 (chart note dated January 13, 1999 that range of
14 movement limited, forward bending caused pain); tr. 516 (note dated
15 July 9, 1999 that back brace limited truncal and pelvic motion);
16 tr. 548 (note dated February 19, 2000 that scoliosis causing
17 functional problems with back pain).

18 There is no evidence of malingering in the medical record. I
19 conclude that the ALJ's stated reasons for rejecting the testimony
20 of Nicholas are not clear and convincing. I further conclude that
21 the ALJ's disbelief of Nicholas's parents is not based on
22 substantial evidence in the record.

23 In Benecke, 379 F.3d at 593, the court made it clear that when
24 the Harman test for remanding for payment of benefits is met, the
25 court does not remand solely to allow the ALJ to "make specific
26 findings regarding excessive pain testimony." Rather, the court
27 takes the relevant testimony to be established as true and remands
28 for an award of benefits. Id. I recommend, therefore, that the

1 testimony of Nicholas and his parents be credited as true.

2 **Conclusion**

3 I conclude that the test for remanding for benefits rather
4 than for additional administrative proceedings has been met. The
5 ALJ has failed to provide legally sufficient reasons for rejecting
6 the evidence of Dr. Tibbitts and the testimony of Nicholas and his
7 parents; if that testimony is credited, it is clear from the record
8 as a whole that the ALJ would be required to find Nicholas
9 disabled; and there are no outstanding issues that must be resolved
10 before a determination of disability can be made. I recommend that
11 this case be reversed and remanded for the payment of benefits.

12 **Scheduling Order**

13 The above Findings and Recommendation will be referred to a
14 United States District Judge for review. Objections, if any, are
15 due April 8, 2005. If no objections are filed, review of the
16 Findings and Recommendation will go under advisement on that date.
17 If objections are filed, a response to the objections is due April
18 22, 2005, and the review of the Findings and Recommendation will go
19 under advisement on that date.

20
21 Dated this 24th day of March, 2005.

22
23 /s/ Dennis J. Hubel
24 Dennis J. Hubel
25 United States Magistrate Judge
26
27
28